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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 68 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

v.

STATE OF NEW JERSEY,
Defendant.

On Motion for Leave to File Original Action

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Counter-Statement of Question Presented

Does the original jurisdiction of the Supreme Court extend to a challenge by a state to the tax laws of another state on the grounds that those laws infringe upon the federal constitutional rights of some residents of the plaintiff state?

Counter-Statement of the Case

Located between two huge metropolitan areas, Philadelphia and New York City, New Jersey has been aptly referred to as a "bedroom community" and as a "corridor state". Each working day over four hundred thousand commuters, exceeding by far the number of interstate commuters for any other state, traverse the two large rivers separating New Jersey from Pennsylvania and New York.* The limited number of available river crossings and the vast number of interstate commuters have led to unparalleled interstate transportation problems. These interstate transportation problems are undoubtedly more substantial than those of any other state in the Union.**

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* Including New Jersey residents who work in other states and residents from other states who commute to New Jersey, it is estimated that each day over 281,000 people commute to work between New York and New Jersey, and that over 164,000 people commute between Pennsylvania and New Jersey.

** The New Jersey Legislature took cognizance of these problems in the preamble to the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1, *et seq.*):

> "Whereas, Metropolitan areas in the United States and particularly in this State and the States bordering it, have grown and become established without regard to the boundary lines of separate States; and
>
> "Whereas, Such growth and establishment have brought about the creation of actual regions within which patterns of activity have developed which have given rise to and increased the degree of the practice of maintaining a place of residence in 1 State and a place of employment in another, also without regard to the boundary lines of separate States; and

(Footnote continued on following page)

These interstate transportation problems have necessitated the creation of several bi-state agencies.* However, these agencies are only able to deal with limited interstate transportation problems involving the operation of bridges and tunnels. The primary interstate transportation problems, such as the operation of mass transit buses and trains, must be borne by the State of New

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> "Whereas, These conditions have given rise to extremely complex problems, culminating in a severe transportation crisis, particularly in the providing of necessary and appropriate facilities and services for the transportation of persons living within 1 State and employed within another; and
>
> "Whereas, Extensive studies conducted over many years have demonstrated that efforts of great magnitude are required to meet the need for appropriate facilities and services for transportation within metropolitan regions, and that such efforts will require substantial funds for their financing; and
>
> "Whereas, Due to the existence of great rivers at the State boundaries, which are obstacles to the movement of land vehicles, the cost of the interstate portions of transportation facilities and services for any kind of land vehicle is massively greater than the cost of connecting or feeder facilities within the boundaries of a single State; . . ."

* For example, compacts have been entered into between Pennsylvania and New Jersey, establishing the Delaware River Port Authority (see N.J.S.A. 32:3-1, *et seq.* and 36 P.S. § 3503, *et seq.*) and the Delaware River Joint Toll Bridge Commission (see N.J.S.A. 32:8-1, *et seq.* and 36 P.S. § 3401, *et seq.*). These agencies operate the various toll and free bridges crossing the Delaware River between Pennsylvania and New Jersey. Similarly, a compact was entered into between New York and New Jersey establishing the New York-New Jersey Port Authority (see N.J.S.A. 32:1-1, *et seq.* and N. Y. Unconsol. Laws § 6401, *et seq.*), to operate the bridge and tunnels across the Hudson River between New York and New Jersey.

Jersey. Thus, the revenues required to fund these interstate transportation projects are a function of state taxation.

The New Jersey tax structure relies very heavily upon real property taxes* which are among the highest in the nation.** Since real property taxes ordinarily are paid only by residents, nonresidents who commute to New Jersey*** traditionally have not contributed substantially to State revenues even though they partake of the benefits offered by the State to alleviate transportation problems, such as the operation of mass transit buses and trains. The undue reliance upon local real property taxes by New Jersey also has severely restricted the capacity of the State to meet its responsibilities for pro-

* According to the U. S. Bureau of Census, in 1973-74 New Jersey real property taxes accounted for 55.51% of the total tax revenues raised in the State. This was the 2nd highest for any state. For the same year Pennsylvania real property taxes accounted for only 25.03% of the total tax revenue in the state, ranking Pennsylvania 39th. Preliminary figures from the U. S. Department of Commerce, Social & Economic Statistics Administration, Bureau of the Census, "Governmental Finances in 1973-74", 1975 Ed.

** Property tax collections per capita in New Jersey for 1973-74 amounted to $379.23, ranking New Jersey 2nd in the nation. This compares to a figure of $153.93 for Pennsylvania, ranking it 35th in the nation. *Id.*

*** The number of persons who live in Pennsylvania and work in New Jersey is approximately equal to the number of New Jersey residents who work in Pennsylvania. The Delaware Valley Regional Planning Commission, which is established jointly by compact between the States of Pennsylvania and New Jersey (see N.J.S.A. 32:27-1, *et seq.* and 73 P.S. § 701, *et seq.*), reports that 84,600 New Jersey residents work in Pennsylvania and that 63,700 Pennsylvania residents work in New Jersey.

viding vital public services. See *Robinson* v. *Cahill*, 67 N. J. 333, 339 A. 2d 193 (1975). One of the public services which has placed heavy stress upon the fiscal resources of the State has been the transportation of interstate commuters. See *e.g. In re Central R.R.*, 485 F. 2d 208 (3rd Cir. 1973) (en banc) *cert.* den. 411 U. S. 1131 (1974).

In order to provide sufficient funds to help alleviate the transportation crisis between Pennsylvania and New Jersey, the Transportation Benefits Tax was enacted by New Jersey in 1971 (N.J.S.A. 54:8A-58, *et seq.*). This law imposes a tax upon certain income and gains derived by residents of New Jersey from sources within another state and upon income of nonresidents from sources within New Jersey if a "severe transportation problem"* is found to exist. N.J.S.A. 54:8A-61. New Jersey residents receive a credit against the New Jersey tax for income taxes paid to Pennsylvania, and the New Jersey Director of Taxation is empowered to enter into a reciprocal agreement with the Pennsylvania tax department to relieve Pennsylvania residents working in New Jersey from having the tax withheld from their wages and salaries if Pennsylvania grants similar treatment to New Jersey residents. N.J.S.A. 54:8A-101(b). Significantly, all of the Transportation Benefits Tax revenues are paid into a special transportation fund, N.J.S.A. 54:8A-106(a). Other than the costs of administering the tax and for refunds to taxpayers, the Transportation Benefits Tax fund is used exclusively to finance projects and programs to help alleviate the transportation problems between

* This situation has been found by the New Jersey Commissioner of Transportation to exist in the New Jersey-Pennsylvania area requiring the imposition of the Transportation Benefits Tax.

New Jersey and Pennsylvania.* The statute specifically provides that the Transportation Benefits Tax fund may not be used except upon a presentation to the Attorney General of New Jersey itemizing the purpose for which the funds will be used, and the transmittal of such itemization to the State Treasurer "with a certification by the Attorney General endorsed thereon that the purpose for which funds are therein proposed to be used are within the terms and intent of the Act. . . ." N.J.S.A. 54:8A-106(b). If any of the moneys in the transportation fund are not used for one of the purposes specified in the Act, a taxpayer has the right to a refund or credit equal to his *pro rata* share of the fund. N.J.S.A. 54:8A-108.

Subsequent to the enactment of the Transportation Benefits Tax Act, the tax fund has been used for the purposes set forth in the Act. For instance, expenditures amounting to $10 million have been made for improvements to the Lindenwold High Speed Transit Line, which runs from southern New Jersey into Philadelphia, supplemented by almost $10 million for bus feeder service

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* N.J.S.A. 54:8A-106(a)(2) specifically provides that the Transportation Benefits Tax fund is to be used:

> "* * * to defray the cost of, or to provide financing by way of advances, loans or otherwise for, projects and programs to meet transportation problems, whether such transportation be by motor vehicle, by rail or rapid transit, or by any other mode or vehicle of transportation whatever, when such project or program includes the transportation of persons or property interstate, between the State of New Jersey and . . . [Pennsylvania], and for the furnishing of such other facilities, services or other benefits for which the class of taxpayers covered by this act will be the major eligible recipient and for which the tax imposed by this act may reasonably be exacted, as may be authorized by law from time to time."

to the Speed Line. Payments have been made for operating expenses of the Delaware River Joint Toll Bridge Commission, and very substantial amounts have been expended for road construction and improvements along the various highways leading to the bridges across the Delaware River. Thus, the revenues derived from the Transportation Benefits Tax Act have enabled New Jersey to undertake significant public transportation projects, including mass transit programs, for the benefit of interstate commuters.

ARGUMENT

The motion by Pennsylvania for leave to file an original action challenging the constitutionality of the New Jersey Transportation Benefits Tax should be denied, because the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution upon which Pennsylvania relies only may be invoked by individual citizens and not by states.

The Commonwealth of Pennsylvania seeks by the present motion to have the Court exercise its original jurisdiction to determine whether certain tax statutes of the State of New Jersey infringe upon the federal constitutional rights of some residents of Pennsylvania. The proposed complaint also asserts that payment by Pennsylvania residents of the New Jersey tax has resulted in the loss of tax revenues to Pennsylvania, due to the credit provisions of the Pennsylvania tax laws, and it seeks the entry of a money judgment against New Jersey payable directly to Pennsylvania in the amount of all taxes collected from Pennsylvania residents under the New Jersey law.

It is now settled that the Court will exercise its original jurisdiction only where it is clearly shown that resort to this extraordinary form of action is required. In its recent decision in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 93-94 (1972), the Court noted that:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' . . . We construe 28 USC § 1251(a)(1), as we do Art III, § 2, cl 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

See also *Washington* v. *General Motors Corp.*, 406 U. S. 109 (1972).

The Court also has recently reaffirmed its view that disputes over the states' imposition of taxes upon nonresidents ordinarily should not be entertained in an original action. In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 497 (1971), Justice Harlan, speaking for the Court, said:

> "As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. *Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes,* motor vehicles, decedents' estates, business torts, government contracts, and so forth. *It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.*" (Emphasis added.)

The Court's original jurisdiction over claims arising from a state's administration of its tax laws was specifically addressed in *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939), in which Massachusetts was denied leave to file an original complaint against Missouri to obtain a declaration that only Massachusetts could impose an inheritance tax on the estate of a Massachusetts domiciliary who had died with most of his assets in several trusts established in Missouri. The assets located in Massachusetts were insufficient to pay the Massachusetts inheritance taxes, and thus resort to the assets in the Missouri trusts was required to satisfy Massachusetts' tax claim. The Massachusetts statute taxed all trust property when the settlor was a Massachusetts domiciliary and reserved a right of revocation, but it exempted from taxation such property within its state owned by residents of other states. Missouri statutes taxed all trust property within its state in which the settlor had reserved a right of revocation, but they exempted from taxation such property owned by a resident of another state which had a reciprocal exemption provision. The Massachusetts exemption provision apparently met this requirement. Nonetheless, Missouri also asserted the exclusive right to impose its own tax on the property in the revocable trusts.

The Court held that Massachusetts could not invoke the original jurisdiction of the Supreme Court to enjoin Missouri from taxing the property in the trusts established by the decedent Massachusetts domiciliary, holding that

the proposed complaint did not present a justiciable controversy between the two states. It said:

> "To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Id.* at 15.

The Court concluded that the imposition of taxes upon the trust assets by Missouri would not directly injure Massachusetts, because there was no constitutional bar to the imposition of inheritance taxes by both states and there were sufficient assets in the trusts to satisfy both tax claims. Therefore, the claims of the two states were not "mutually exclusive." Compare *Texas* v. *New Jersey*, 379 U. S. 674 (1965); *Texas* v. *Florida*, 306 U. S. 398 (1939). The Court further concluded that no justiciable controversy was presented by Massachusetts' contention that the Missouri taxing authorities had improperly refused to exempt the assets of the Missouri trusts under the reciprocity provisions of its tax laws, saying:

> "Each State has enacted its legislation according to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation." *Id.* at 16-17.

Finally, the Court held that Massachusetts could not invoke the original jurisdiction of the Supreme Court on behalf of its residents to challenge the imposition of taxes by Missouri. *Id.* at 17.

It is as clear in this case as it was in *Massachusetts* v. *Missouri* that there would be no constitutional bar to both

Pennsylvania and New Jersey taxing the incomes of interstate commuters (*Shaffer* v. *Carter*, 252 U. S. 37 (1920)), and that the taxpayers earn sufficient income to pay both taxes. Consequently, the taxes are not, in the terminology of *Massachusetts* v. *Missouri*, "mutually exclusive". It also is even clearer than in *Massachusetts* v. *Missouri* that the only impediment to the collection by Pennsylvania of income taxes from its residents who work in New Jersey is the credit provision of its own tax laws, which it is free to amend at any time. Therefore, Pennsylvania is not being directly injured by the imposition of the New Jersey tax and it has not ". . . suffered a wrong through the action of [New Jersey], furnishing grounds for judicial redress." 308 U. S. at 15. *Cf. Warth* v. *Seldin*, 45 L. Ed. 2d 343, 360 (1975). Rather, if there is any claim against New Jersey, it is a claim which should be raised by the Pennsylvania residents upon whom the Transportation Benefits Tax has been imposed just as the Court in *Massachusetts* v. *Missouri* left it to the administrator of the estate of the Massachusetts decedent to raise any challenge to the imposition of taxes by Missouri.

The conclusion that the claim over which Pennsylvania seeks to have the Court accept original jurisdiction is in fact the claim of the taxpayers who pay the taxes is reinforced by examining the constitutional contentions advanced by Pennsylvania. Paragraph 13 of the complaint Pennsylvania seeks to file indicates that the bases of its claim are the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. However, it is firmly settled that the constitutional guarantee of these clauses extend to individuals only and not to states. A state is not a "person" entitled to equal protection of the laws under the Fourteenth Amendment (*Wisconsin* v. *Zimmerman*, 205 F. Supp. 673

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(W. D. Wis. 1962); *cf. South Carolina* v. *Katzenbach*, 383 U. S. 301, 323-324 (1966)), nor a "citizen" entitled to the rights of the Privileges and Immunities Clause. *Hague* v. *C.I.O.*, 307 U. S. 496, 514 (1939); *Paul* v. *Virginia*, 75 U. S. 168, 178-180 (1868). Thus, the only cause of action indicated by Pennsylvania's complaint is one personal to the taxpayers who have paid the Transportation Benefits Tax, and it is those taxpayers—not Pennsylvania in an original action—who should be pursing any claim as to the validity of the New Jersey tax either on Privileges and Immunities or Equal Protection grounds. Indeed, it is noteworthy that *Austin* v. *New Hampshire*, 420 U. S. 656 (1975), upon which Pennsylvania so heavily relies on the merits of its claim, was successfully pursued by individual taxpayers, as has every other challenge brought before the Court to the validity of a tax on Privileges and Immunities or Equal Protection grounds. See *e.g. Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949); *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920); *Travellers Insurance Co.* v. *Connecticut*, 185 U. S. 364 (1902); *Ward* v. *Maryland*, 79 U. S. (12 Wall) 418 (1870). There is no reason to doubt that any Pennsylvania resident subject to the New Jersey tax can raise any constitutional claim he may have in the same manner as did the petitioners in *Austin*.* Therefore, whatever the result might be of an

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* The Transportation Benefits Tax (N.J.S.A. 54:8A-114) provides that the State Tax Uniform Procedure Law is applicable and, under the provisions of the latter law, a taxpayer, at any time within two years after the payment of a tax, may file a claim for refund with the Division of Taxation. N.J.S.A. 54:49-14. N.J.S.A. 54:51-1 provides for an appeal to the State Division of Tax Appeals from an adverse decision of the Division of Taxation, such as a denial of

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action brought by a nonresident taxpayer,* it is patently clear that the constitutional provisions cited by Pennsylvania confer no rights upon the states and that Pennsylvania has no cause of action. *Cf. Massachusetts* v. *Missouri, supra; South Carolina* v. *Katzenbach, supra.*

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a refund claim. See also N.J.S.A. 54:2-34. Appeals from an adverse decision of the Division of Tax Appeals may be taken as of right to the Appellate Division of the New Jersey Superior Court. New Jersey Court Rule 2:2-3(a). Also, when the interests of justice dictate, a declaratory judgment action to contest the constitutionality of a tax statute can be instituted in the Law Division of the Superior Court. See, *Roadway Express* v. *Kingsley*, 37 N. J. 136, 179 A. 2d 729 (1962). It should be noted that subsequent to the decision in *Austin* v. *New Hampshire, supra*, some refund applications have been submitted by persons subject to the New Jersey transportation taxes. The Division of Taxation has denied these refund applications on the ground that the New Jersey commuter taxes are different from the New Hampshire statute and, consequently, these refund denials are appealable to the State Division of Tax Appeals.

* It is noteworthy that the brief submitted by Pennsylvania in support of its motion for leave to file complaint does not contain any argument to support its contention that the New Jersey tax is unconstitutional. Rather, it simply cites *Austin* v. *New Hampshire, supra* and then apparently assumes that the New Jersey tax is the same as the New Hampshire tax found to violate the Privileges and Immunities of the appellant taxpayers in *Austin*. In point of fact, there are significant differences between the two taxes. Unlike the New Hampshire tax, the Transportation Benefits Tax is specifically designed to generate revenue for interstate transportation projects which directly benefit the nonresident commuters who pay the tax by making it easier for them to move from state to state. Therefore, the New Jersey tax, rather than discouraging Pennsylvania residents from working or doing business in New Jersey, actually promotes such interstate commerce and thus is fully consistent

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with the policies which underlie the Privileges and Immunities Clause. In *Toomer* v. *Witsell*, *supra*, the Court noted:

> "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.
>
> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." 334 U. S. at 396.

Here, the fair allocation of the costs of interstate transportation projects among those who benefit from the projects would represent a substantial reason for any overall disparity in tax treatment. In addition, New Jersey does not concede that there is any disparity in tax treatment. New Jersey residents are subject to substantial taxes, including local real property taxes, which nonresidents ordinarily are not called upon to pay, and it is New Jersey's position that the Transportation Benefits Tax goes no further than necessary to establish a substantial equality of treatment in taxation between residents and nonresidents. See *Travellers Insurance Co.* v. *Connecticut, supra*. There are thus substantial questions as to the effect of *Austin* v. *New Hampshire* upon the New Jersey Transportation Benefits Tax.

Although the brief in support of the motion for leave to file complaint fails to set forth any argument to support the claim that the New Jersey tax is unconstitutional, it contains an extended discus-

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cusion in support of the thesis that this anticipated judgment "should be applied retroactively". Even ignoring the fact, discussed in the text *infra*, that any claim for a refund of taxes previously paid is a claim personal to the taxpayer, not the State in which the taxpayer resides, Pennsylvania has seriously misconceived the impact of the Court's decisions dealing with retroactivity questions in urging that a judgment should be entered against New Jersey for all taxes collected under the Transportation Benefits Tax from Pennsylvania residents. It is fundamental that a party who desires to challenge the imposition of a tax must make a timely demand for refund or other claim pursuant to the provisions of the applicable tax statute. *Kohn* v. *Central Distributing Co.*, 306 U. S. 531 (1939); *Matthews* v. *Rodgers*, 284 U. S. 521 (1932). If no timely challenge to the imposition of the tax is filed, the taxing authorities are then entitled to rely upon the receipt of those revenues. *Burrill* v. *Locomobile Co.*, 258 U. S. 34 (1922); *Abernathy* v. *Carpenter*, 208 F. Supp. 793 (W. D. Mo. 1962) *aff'd* 373 U. S. 241 (1963); *Henry* v. *Metropolitan Dade County*, 329 F. 2d 780 (5th Cir. 1964). The Court's decisions dealing with the retroactivity of new constitutional holdings do not in any way undermine these principles. Those decisions ordinarily deal with whether new constitutional holdings should apply to administrative or judicial actions that have not become final by virtue of the expiration of the applicable periods of limitations. See *e.g. Lemon* v. *Kurtzman*, 411 U. S. 192 (1973); *City of Phoenix* v. *Kolodzieyski*, 399 U. S. 204 (1970). See also *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295-297 (1970) (Harlan, J., concurring). In any event, this is an issue to be litigated, if necessary, between New Jersey and the Pennsylvania residents who have paid the New Jersey tax, but in no event could it give rise to a claim by Pennsylvania for the direct recovery of taxes paid by its residents.

Finally, if the Court should determine, contrary to the position taken by New Jersey in this brief, that Pennsylvania is authorized to proceed directly against New Jersey in connection with the Transportation Benefits Tax, New Jersey is prepared to prove that before this tax was signed into law in 1971, there were discussions regarding the tax between officials at the highest levels of the governments of the two states and, while no formal agreement was entered into,

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The fact that the constitutional provisions cited by Pennsylvania confer no rights upon the states sharply distinguishes the present case from the boundary dispute (*Nebraska* v. *Iowa*, 406 U. S. 117 (1972); *Louisiana* v. *Mississippi*, 202 U. S. 1 (1906); *Rhode Island* v. *Massachusetts*, 37 U. S. (12 Pet.) 657 (1838); *New Jersey* v. *New York*, 30 U. S. (5 Pet.) 284 (1831)); water diversion (*Arizona* v. *California*, 373 U. S. 546 (1963); *New Jersey* v. *New York*, 345 U. S. 369 (1953); *Colorado* v. *Kansas*, 320 U. S. 383 (1943)) and noxious substances (*North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907); *Missouri* v. *Illinois*, 180 U. S. 208 (1901)) cases relied upon by Pennsylvania, in which the causes of action were grounded upon federal common law fashioned by the Court in furtherance of the interests of states in protecting their sovereignty and the comfort, health and prosperity of their citizens. See *Illinois* v. *City of Milwaukee*, *supra*, 406 U. S. at 104-108. See also *Wyoming* v. *Colorado*, 286 U. S. 494, 508-509 (1932); *Louisiana* v. *Texas*, 176 U. S. 1, 23-27 (1900) (Harlan, J. concurring). In this case, Pennsylvania does not set forth any cause of action involving its sovereign rights as a state; rather it simply

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(Footnote continued from preceding page)

Pennsylvania never made any attempt from 1971 to the filing of this motion in July 1975 either to withhold its tax credit from residents who paid the New Jersey tax or to challenge the tax. New Jersey also is prepared to prove that it has spent substantial amounts of revenues collected under the Transportation Benefits Tax Act for interstate transportation projects which have directly benefited the Pennsylvania residents who pay the tax. These obviously are significant equitable considerations that would need to be taken into account in determining whether a judgment of unconstitutionality of the Transportation Benefits Tax Act should be given any retroactive effect.

contends that there has been a violation of constitutional rights personal to its citizens. Therefore, the proposed complaint falls squarely within the line of cases holding that the original jurisdiction of the Court may not be invoked by a State to pursue a cause of action on behalf of its individual citizens. *Massachusetts* v. *Missouri*, *supra*; *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387 (1938); *Oklahoma* v. *Atchison, T. & S. F. RR Co.*, 220 U. S. 277 (1911); *New Hampshire* v. *Louisiana*, 108 U. S. 76 (1883).

A further indication of the inappropriateness of this matter proceeding as an original action is that the proposed complaint seeks direct relief on behalf of Pennsylvania for which there is clearly no constitutional or statutory authority. Even though the constitutional provisions cited by Pennsylvania afford protection only to individuals and not to states, Pennsylvania nevertheless asks the Court to enter a money judgment directly in its favor against New Jersey. However, if New Jersey has improperly imposed a tax upon residents of Pennsylvania, it is the taxpayers and not the state in which they reside that has a claim against New Jersey. The governing New Jersey statutes and court rules contain express provisions by which a taxpayer may contest the imposition of a tax.* Thus, the nonresident taxpayers have the right, if the Transportation Benefits Tax was improperly imposed, to seek the return of *their* money. If the refund of that money would give rise to an obligation to pay additional taxes to Pennsylvania, either in the form of an amended return for the year in which a credit was claimed for taxes paid to New Jersey or as additional income for the year in which the refund were received, then the taxpayer would have to report that additional

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* See footnote on pp. 12-13, *supra*.

income to Pennsylvania.* However, Pennsylvania should not be permitted to invoke the original jurisdiction of the Court as a device to short-cut the tax collection procedures provided by its own laws.**

The Court also should not permit its original jurisdiction to be invoked as a device to circumvent the anti-tax-injunction statute, which provides that "[t]he district courts shall not enjoin, suspend or restrain the levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. See Hart & Wechsler, The Federal Courts Under the Federal System (2nd ed.) pp.

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* The obligation of the Pennsylvania taxpayer to report that income to Pennsylvania may not be altogether clear as a matter of Pennsylvania law. The Pennsylvania income tax is expressly limited to eight classes of income, none of which includes a tax refund. 72 P.S. § 7303. Thus, if a Pennsylvania resident receives a tax refund from another state, it may not be taxable as income. Moreover, it is unclear whether a taxpayer must file an amended return for the prior years in which he took as a credit the amount of tax paid to another state by virtue of 72 P.S. § 7314(a), inasmuch as that statute is silent as to whether the tax for which the credit is claimed must be lawfully or constitutionally imposed. Pennsylvania thus may be seeking to secure through this original action relief to which it would not be entitled under its own tax laws.

** At the very minimum, the Pennsylvania taxpayers, whose money Pennsylvania seeks, are indispensable parties to this action, since a money judgment in favor of Pennsylvania would bar them from seeking a tax refund from New Jersey. However, Pennsylvania has failed to name the taxpayers as defendants, perhaps because it is clear that their joinder as parties would foreclose the Court from assuming original jurisdiction. *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158 (1922); *California* v. *Southern Pacific Co.*, 157 U. S. 229 (1895).

978-979. Although this statute does not speak directly to the subject of original actions in the Supreme Court, probably because Congress never contemplated the type of action Pennsylvania now seeks to file, it does represent an unmistakable expression of congressional intent that the states ordinarily should be left free to administer their tax laws without being subjected to collateral attacks in the federal courts. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943); see also *Perez* v. *Ledesma*, 401 U. S. 82, 126-128 (1971) (Brennan, J., concurring). Furthermore, this statute is reflective of a long-standing policy of the Court not to entertain direct challenges to the validity of state tax statutes unless resort has first been made to state administrative and judicial remedies. *Toomer* v. *Witsell, supra* at 392; *Matthews* v. *Rodgers, supra.* This well-established congressional and judicial policy of non-intervention in state tax matters would require the denial of relief to Pennsylvania even if its original action were otherwise maintainable. *Cf. Non-Resident Tax Ass'n* v. *Municipality of Philadelphia*, 341 F. Supp. 1135 (D. N. J. 1971), *aff'd* 406 U. S. 951 (1972).

Moreover, the mere fact that the invalidation of the New Jersey tax would increase tax collections by Pennsylvania under its own tax laws does not confer power on Pennsylvania to pursue a constitutional challenge to New Jersey's tax laws on behalf of its residents. *Cf. Florida* v. *Mellon*, 273 U. S. 12 (1927). Credits, exemptions and deductions for taxes paid to other jurisdictions are commonplace in the tax laws of both the federal and state governments. Therefore, a successful constitutional attack upon almost any tax would have some collateral impact upon the taxes collectible by other taxing authorities. That impact, however, is the natural by-product of the credits, exemptions and deductions built

into the tax laws of the other taxing authorities, and it may not be used as a springboard from which to attack the validity of those taxes. The contrary jurisdictional premise upon which Pennsylvania's proposed complaint is grounded would have far-reaching implications. For example, the Internal Revenue Code contains broad exemptions in the estate and income tax provisions for taxes paid to state and local governments. 26 U.S.C. §164, §2011. Does this mean that the federal government can attack the validity of any state or local tax if that might result in an increase in federal tax revenues? Similarly, the amounts paid pursuant to the Louisiana franchise tax sustained by the Court in *Colonial Pipelines Company* v. *Traigle,* 421 U. S. 100 (1975) apparently could be taken as a deduction in the calculation of the net income in the Georgia corporate income tax. 26 Ga. Code Annot., §92-3102. Does this mean Georgia could have challenged the Louisiana tax in an original action before the Supreme Court? Clearly, the recognition of such a jurisdictional foundation for one taxing authority to challenge the validity of the tax laws of another taxing authority would be inconsistent with well-established principles of justiciability reflected in *Massachusetts* v. *Missouri* and *Florida* v. *Mellon.*

It is clear, under these circumstances, that the state which provides a credit for taxes payable to another jurisdiction does not, in the words of *Missouri* v. *Massachusetts, supra,* 308 U. S. at 15, "[suffer] a wrong through the action of the other State, furnishing ground for judicial redress." Rather, "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth* v. *Seldin, supra* at 354. Here, the only parties with a cognizable complaint under the Equal Protection or Privileges and Immunities Clauses are the non-residents who have paid the New Jersey tax, and the Court therefore should leave it those taxpayers to raise in an appropriate proceeding the issues projected for review by Pennsylvania.

CONCLUSION

It is respectfully submitted for the foregoing reasons that Pennsylvania's motion for leave to file an original action challenging the constitutionality of the New Jersey Transportation Benefits Tax Act should be denied.

Respectfully submitted,

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